
IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. W. DALY,

Appellant,

vs.

C. W. LONG,

Appellee.

Transcript of the Record

*Upon Appeal from the District Court of the United
States for the District of Idaho, Southern
Division.*

No.....

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*Upon Appeal from the District Court of the United
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Division.*

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

WILLIAM HEALY,
Boise, Idaho,
Solicitor for Appellant.

J. H. RICHARDS, and
OLIVER O. HAGA,
Boise, Idaho,
Solicitors for Appellee.

INDEX

	Page
Agreed Statement	7
Assignment of Errors.....	61
Bond on Appeal.....	64
Citation	69
Clerk's Certificate	70
Decision	56
Decree	59
Letter, Daly to Long, 7-12-18.....	26
Letter, Long to Daly, 8-1-18.....	27
Letter, Daly to Long, 8-11-18.....	28
Letter, Long to Daly, 11-21-18.....	29
Letter Daly to Long, 12-13-18.....	30
Letter, Daly to Long, 2-10-19.....	30
Letter, Daly to Long, 3-25-19.....	31
Letter, Long to Daly, 8-14-19.....	32
Letter, Daly to Long, 8-18-19.....	33
Letter, Long to Daly, 9-19-19.....	33
Letter, Daly to Long, 9-26-19.....	34

INDEX—(Continued)

	Page
Letter, Daly to Long, 10-13-19.....	36
Letter, Long to Daly, 2-3-20.....	36
Letter, Daly to Long, 2-9-20.....	37
Letter Long to Daly, 2-18-20.....	38
Letter, Daly to Long, 3-8-20.....	39
Letter, Long to Daly, 7-12-20.....	40
Letter, Daly to Long, 8-21-20.....	41
Letter, Long to Daly, 9-27-20.....	42
Letter, Daly to Long, 10-2-20.....	43
Letter, Long to Daly, 6-28-21.....	45
Names and Addresses of Attorneys of Record.....	6
Notice, Long to Daly, 9-30-19.....	35
Petition for Appeal.....	60
Praeipie to clerk for Transcript on appeal.....	68
Order Allowing Appeal.....	63
Stipulation relative to record on appeal.....	66
Testimony of J. W. Daly.....	45
Testimony of C. W. Long.....	50

AGREED STATEMENT.

No. 956.

In the above entitled cause, the plaintiff, J. W. Daly, having appealed to the Circuit Court of Appeals of the United States for the Ninth Circuit from the decree made, entered and filed herein on September 30, 1922, and the solicitors for the respective parties being of the opinion that the questions presented by the appellant can be determined by the appellate court without examination of all the pleadings and evidence, do hereby and with the approval of the Honorable Frank S. Dietrich, District Judge of the United States, of and for the District of Idaho, before whom the cause was tried and by whom the decree was signed, stipulate and agree that the following shall constitute a statement of the case and that the following statement shows how the questions arose and were decided in the district court, and that sufficient of the pleadings and of the facts as proved or sought to be proved as is essential to the decision of such questions by the appellate court, is included with this statement of the case:

That in July, 1921, the appellant herein, J. W. Daly, commenced, in the District Court of the Third Judicial District of the State of Idaho, an action against the respondent, C. W. Long, by filing a complaint therein, the material parts of which are as follows:

*“In the District Court of the Third Judicial District
of the State of Idaho, in and for the
County of Owyhee.*

J. W. DALY,)	
	Plaintiff,)	
vs.)	COMPLAINT.
C. W. LONG,)	
	Defendant,)	

“Comes now the plaintiff and complaining of the defendant herein, alleges:

“That plaintiff now is, and for a long time hitherto has been, the owner and in the possession of those certain unpatented quartz lode mining claims situate on the northwesterly slope of Florida Mountain in Carson Mining District, Owyhee County, Idaho, and bounded and described as follows: (Here follows a particular description of the Daly, Globe, Payette, Orinoco, Snowflake and Grand Central lode mining claims and the Daly millsite.)

“That plaintiff is the owner of and has the exclusive title and right to possession, to the above described claims and premises as against all the world, except the United States, which has the legal title thereto.

“That the defendant claims an estate or interest in said mining claims and premises adverse to the plaintiff.

“That the claim of the said defendant is without

any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said mining claims, land or premises, or any part thereof.

“WHEREFORE, THE PLAINTIFF PRAYS:

“1. That the defendant be required to set forth the nature of his claim; and that all adverse claims of the defendant may be determined by a decree of this Court.

“2. That by said decree it be decreed and adjudged that the defendant has no estate or interest whatever in or to said mining claims, land or premises; and that the title of plaintiff is good and valid and that the same be quieted in him.

“3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said mining claims, land and premises adverse to the plaintiff.

“4. Plaintiff further prays for his costs and disbursements in this behalf expended and for such other and further relief as shall seem meet and agreeable to equity.”

That thereafter the cause was removed to the District Court of the United States for the District of Idaho, southern division, upon the application of the respondent Long, on the ground of diversity of citizenship.

That thereafter the appellee filed in the latter court an answer to the said complaint denying the material allegations thereof and interposing an affirmative defense or counter-claim, the material parts of which are as follows:

“Further answering the complaint, and for a defense of the whole thereof, and as a counterclaim to the cause of action therein alleged, this defendant alleges and shows:

“That on or about the 24th day of June, 1918, the said plaintiff, J. W. Daly, represented to this defendant that he was the owner of the mining claims and mining property described in the complaint herein, and the said plaintiff pretending to be desirous of developing said property and to interest this defendant therein, entered into a written agreement with this defendant, a full, true and correct copy of which is attached to the answer herein as Exhibit “A”, and to which exhibit reference is hereby made for a full statement of the terms, provisions and conditions thereof.

“That said agreement was duly acknowledged by plaintiff and defendant before a notary public, as required by the laws of the State of Idaho, and the same was thereafter, to-wit, on the 25th day of July, 1918, by the said plaintiff, J. W. Daly, filed for record in the office of the County Recorder of Owyhee County, Idaho, and was duly recorded in

Book 4 of Bonds and Agreements on page 259 et seq. of the records of said county.

“That this defendant now is and ever since the execution of said agreement has been able, ready and willing to carry out all the terms and provisions thereof by him to be kept and performed, and has at various times incurred expenses and acquired tools and equipment for the purpose of doing and performing the work to be done and performed under said agreement; that such expenses have been incurred and such machinery, tools and equipment acquired in good faith and in reliance upon the said agreement between plaintiff and defendant, and for the purpose of carrying out the provisions thereof.

“That the said plaintiff has, during all of said period been a resident of the mining district in which said mining property is situated, and has resided on or in the vicinity of said mining claims, and has from time to time and repeatedly requested that the work to be done under said agreement (Exhibit “A”) be postponed and delayed from time to time, and that the machinery or equipment thereby required for use in connection with such work be not purchased, but that the purchase thereof be postponed and deferred, and plaintiff has repeatedly claimed that he was not able to do his share of such work or to pay his share of the cost

of doing the same or his share of the cost of purchasing the equipment, tools and machinery required for doing such work, and by reason of his inability to do his share of such work or pay his part of such expenses, said plaintiff has urged and requested the postponements and delays above referred to, and said plaintiff has further from time to time urged that it was inopportune because of climatic conditions or financial or other local conditions to do the work at the times and in the manner contemplated by said agreement, and has urged and claimed that it would be to the best interest of all parties to defer and delay for the time being the doing of the work and the carrying out of the terms and provisions of said agreement.

“That this defendant has repeatedly informed plaintiff of this defendant’s willingness, desire and ability to proceed in accordance with the terms of said agreement to develop said property and to do the work contemplated by said agreement and to otherwise carry out the terms and provisions of said agreement, and this defendant alleges and shows that any defaults, delays or failure to carry out all the terms and provisions of said agreement by this defendant to be kept and performed are due wholly to the urgent requests of said plaintiff as aforesaid and to the delays and failures of said plaintiff to carry out his part of said agreement.

“That it would be most inequitable and unjust to this defendant for the said plaintiff now to be permitted to cancel or annul said agreement or to take advantage of any of the pretended delays or failure of this defendant to carry out any of the provisions of said agreement according to the terms thereof.

“WHEREFORE, this defendant, having fully answered plaintiff’s complaints, prays:

“1. That plaintiff’s bill of complaint be dismissed, and that plaintiff take nothing thereby.

2. That it be adjudged and decreed that the said agreement (Exhibit “A”) attached to this defendant’s answer is a valid and existing agreement and in force and effect, and that this defendant has and is entitled to have an undivided one-half interest in and to the said mining claims and mining property under and pursuant to the terms and provisions of said agreement as modified at the instance and request of said plaintiff as aforesaid.”

That attached to said answer and counter claim and marked Exhibit “A” is the following copy of agreement:

AGREEMENT

“WHEREAS, J. W. DALY, a bachelor, is the owner of the certain Six (6) unpatented, contiguous and duly recorded mining claims and attend-

ant Mill Site, all located in the Carson Mining District as situated near Silver City, in Owyhee County, Idaho, and described as follows, to-wit: the Globe Quartz Claim, the Payette Quartz Claim, and the Daly Quartz Claim, all as relocated by James T. Daly and John W. Daly, and as now held by John W. Daly, together with the Snowflake Quartz Claim, as deeded to the said James T. Daly and John W. Daly by J. J. Connor and George R. Hazel, and now owned by the said John W. Daly, together with the Grand Central Quartz Claim, a fraction as located by the said John W. Daly, and the Orinoco Quartz Claim, a fraction as located by John W. Daly and O. B. Brunbaugh, and now owned by John W. Daly, the above six claims being known as the Globe and Daly Group, together with the duly recorded Daly Mill Site, which site joins said group at the northerly end of the aforesaid Globe Quartz Claim and contains five acres of ground, together with the equipment thereon, and

“WHEREAS, one certain C. W. LONG desires to acquire an undivided one-half interest therein, all under the terms and conditions hereinafter designated, and

“WHEREAS, the above named Daly has agreed to transfer unto the said Long an undivided one-half interest in and to the properties and equipment above described and referred to, all under the terms and conditions hereinafter designated,

and for the consideration hereinafter set out, it is hereby specifically agreed as follows:

“That for the consideration hereinafter named and under the conditions hereinafter designated. the said Daly agrees to sell and deliver an undivided one-half interest in and to the properties and equipment above described and referred to unto the said Long.

“IT IS FURTHER agreed that both parties hereto will work together in developing and opening up the above described properties as soon as the said Long can begin such work conveniently, it being agreed that said Long will begin such work not later than October 1st, 1918, provided that in the event of unforeseen and unavoidable contingencies, the said Long shall have until October 1st, 1919, to begin such work with said Daly in so developing and opening up said properties. It is further agreed at this time that the work and services and the furnishing of equipment, supplies, material, etc., by the said Long as hereinafter designated, shall be deemed and considered by both parties as the consideration for such transfer unto the said Long by the said Daly of such undivided one-half interest.

“IT IS FURTHER AGREED that the fiscal year for doing such work in the developing and opening up of said properties shall begin on the 1st day of October of each year with the above res-

ervations as to unforeseen and unavoidable contingencies, and it is further agreed that at least six months of such work in so developing and opening up said properties shall be by said parties done during each such fiscal year.

“IT IS FURTHER AGREED by the said Daly that in the present main tunnel of said properties is now located a shaft or winz fifty feet deep and it is further agreed by the parties hereto that this said shaft shall be sunk fifty feet so as to make a level at a distance of one hundred feet below the present main tunnel, that at this one hundred foot level a tunnel shall be cross-cut to the vein, that said parties shall drift upon this vein for fifty feet each way from such cross-cut, that said shaft or winz shall then be sunk another one hundred feet and another cross-cut shall be run from such point to the vein, said vein there to be drifted fifty feet each way from said cross-cut.

“IT IS FURTHER AGREED that the parties hereunto shall each do or cause to be done one-half of the labor above referred to and each of said parties shall pay one-half of all costs for material, tools, machinery, equipment and supplies necessary to properly perform said work of developing and opening up said properties.

“IT IS FURTHER AGREED that if either party to this contract shall fail or refuse to perform the

work or cause said work to be performed or fail or refuse to furnish the matters and things by him agreed to be furnished, all as in the foregoing paragraphs provided specifically and as designated in this contract, then the other party shall have the right to so furnish and do, and said party so failing to furnish or do, as the case may be, shall repay said party so furnishing and doing the reasonable and proper price for such party.

“IT IS FURTHER AGREED that any ore of sufficient value shall be disposed of in such manner as shall seem most advantageous to both parties and the net receipts therefor shall be credited one-half to each of the parties hereto.

“IT IS FURTHER AGREED that if either of the parties hereunto shall be inducted into, or shall enlist in, the service of the United States for the purpose of assisting in the carrying on of the present war, that the privileges of this contract shall be suspended if the party so inducted or enlisted shall so desire, such suspension to last until both parties are out of the service of the United States.

“Provided, that if the party not inducted into or enlisted with the United States shall so desire, he may proceed with such work and the party in the service of the United States shall so soon as his service is ended and within a reasonable time thereafter, reimburse such other party for such ex-

pense and labor as said party shall have incurred in doing such work.

“IT IS FURTHER AGREED by the said Daly that he has a good right to sell and dispose of said properties at this time, that in the event any of the locations are defective he will at once remedy such defect and this contract shall be deemed and considered in full force and effect as to such remedies and corrected location, and said Daly further agrees that he has a good right to sell and assign said undivided one-half interest in and to the properties and equipment above described and referred to.

“IT IS FURTHER AGREED that the parties shall each be entitled to an half interest in and to all personal property, tools, and equipment by said parties accumulated in working and developing said properties under the terms and conditions of this contract and agreement.

“IT IS FURTHER AGREED between the parties hereto that said Daly has this day made unto the said Long his deed to the undivided one-half interest herein referred to, which said deed shall be placed in escrow, together with a copy of this contract, with the 1st Natl. Bank at Baker in the State of Oregon.

“IT IS FURTHER AGREED by the said Daly that in the event any of the descriptions or refer-

ences contained in said deed are found to be deficient or defective, the said Daly will make a proper deed correcting the same at such time as such corrected deed shall be demanded and required in order to fulfill the terms of this present contract.

“IT IS FURTHER AGREED that the parties hereunto may at any time during the life of this contract change any one or more of the terms and conditions thereof by mutual agreement, and it is further agreed that any change or changes by said parties so made shall be in full force and effect after made and agreed upon, but such change or changes shall in no wise effect the remaining portion or portions of said contract by said parties left unchanged.

“IT IS FURTHER AGREED between the parties hereunto that if the said Long shall, after proper demand by said Daly, default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed, any and all rights which the said Long shall have in and to the properties herein referred to, either under the terms of this contract or otherwise, shall at once cease and be of no effect and the rights of the said Long in and to said properties under the terms of this contract or otherwise shall be deemed null and void absolutely and in that event it is further agreed that the said Daly may and he shall have the right to demand and receive from said Bank said deed.

It is further agreed in the event the said Long shall default under this contract that any and all rights which he may have for work and services performed and material, supplies, etc., furnished, all under the terms of this contract, shall be null and void and of no effect and the said Long shall have from that time on no claim against the said Daly or against said properties.

“IT IS FURTHER AGREED that if the said Long shall carry out and observe the terms and conditions of this contract, all in the manner and to the extent as therein provided by him to be observed and performed, as the said contract shall be in its present form or in any form or change which the same may hereafter take by mutual agreement of the parties, then in either of said events the said Long shall have the right to demand and receive and hold the said deed to the undivided one-half interest as referred to in this contract, which said deed shall be by said Long taken and held as a full compliance by the said Daly with the terms of this contract.

“IN WITNESS WHEREOF, the parties above named have hereunto set their respective hands and seals on this, the 24th day of June, 1918.

WITNESSETH TO:

C. T. Goodwin
Iola Love

J. W. DALY
C. W. LONG

(Seal)
(Seal)

“State of Oregon,)
) ss.
 County of Baker,)

“On the 24th day of June, 1918, personally came before me, a Notary Public, in and for the said County and State, the within named J. W. Daly, a bachelor, and C. W. Long to me personally known to be the identical persons described in, and who executed the within instrument and acknowledged to me thathe..... executed the same freely and voluntarily for the uses and purposes therein named.

“IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal this the day and year last above written.

C. T. GODWIN,

Notary Public for Oregon.

My Commission expires Nov. 7, 1920.”

C. T. GODWIN,
 Notary Public
 State of Oregon.

That thereafter the appellant filed a reply to said counter-claim denying the material allegations thereof, except the making, execution and recording of said agreement marked Exhibit “A”, and interposing an affirmative defense thereto, the material parts of which are as follows:

“Further replying to said counter-claim of the defendant, and by way of affirmative defense, the plaintiff alleges:

“That on or about the 24th day of June, 1918, the plaintiff and the defendant made and entered into a contract in writing with reference to the mining claims and premises described in the complaint herein, title to which plaintiff seeks to quiet in himself as against this defendant. A full, true and correct copy of this contract and agreement is embodied in the answer and counter-claim of the defendant herein filed in this cause, and is marked Exhibit “A”, and the plaintiff by reference to said pleading of the defendant incorporates said agreement into this reply.

“That by the terms of said agreement it was provided that the defendant Long should commence work on said mining claims and premises not later than October 1, 1918, provided that in the event of unforeseen and unavoidable contingencies, the said defendant should have until October 1, 1919, in which to begin such work on said properties, and that he should perform not less than six months' work on said properties during each year until the requirements of said contract should be complied with. It was further provided by the terms of said agreement that if the said defendant should default in the commencement or in the performance of such work, any and all rights which the said defendant might have in and to said mining properties by virtue of the terms of such contract should at once cease and be of no effect and the contract should

thereupon be deemed null and void. And it was further provided in said agreement that the performance of said work and services and the furnishing of equipment, supplies and materials by the said defendant should be deemed and considered by the parties as the consideration for the transfer unto the said defendant by the said plaintiff of an undivided one-half interest in and to said mining property and premises, and that such interest should be earned by the defendant and transferred to him by the plaintiff only upon the full performance by the defendant of the terms of said contract at the times and in the manner therein provided.

“That defendant has wholly failed, neglected and refused to carry out the terms and provisions of said agreement, or any of them, by him to be kept and performed; that he has neither provided equipment nor supplies nor has he performed any labor on the property described in said agreement, either in conjunction with the plaintiff or otherwise.

“That without fault on the part of plaintiff and without excuse on his own part, the defendant failed to commence work on said property on October 1, 1918, as agreed; that equally without fault on the part of plaintiff and without excuse on his own part, he failed to commence work on October 1, 1919; and that during neither of said years, or at any other time before or since, did he perform or attempt or tender performance of any labor on said

property; that he has defaulted in each and every provision of said agreement.

“That plaintiff has neither prevented performance of the terms of said agreement by the defendant nor waived his failure to perform, nor has plaintiff at any time been himself in default but has at all times been ready, willing and able to perform and has performed all the covenants and conditions thereof on his part.

“That after such default on the part of the defendant and before the commencement of this action, the plaintiff terminated and annulled said agreement as provided by the terms thereof and thereupon brought this action for the purpose of quieting his title as against the defendant.

“That having defaulted in all the provisions of said agreement, any and all rights which the defendant might have, or rightfully claim to have or acquire, in or to the property described in the complaint herein and in said agreement, thereupon terminated and ceased to exist.

“That the defendant wrongfully claims and asserts an interest in the property and premises described in the complaint herein under and by virtue of the terms of said agreement, but that said claims are without right and are injurious to the plaintiff. That said agreement, being of record casts a cloud on plaintiff’s title to said property

and the claims defendant now asserts thereunder are wrongful and injurious to plaintiff. That plaintiff has no adequate remedy at law.

“WHEREFORE, the plaintiff, having fully replied to the counter-claim of the defendant, prays:

“1. That defendant’s counter-claim be dismissed and that he have no relief thereby.

“2. That it be adjudged and decreed that the said agreement attached to the defendant’s answer and counter-claim, (marked Exhibit “A”) is void and of no effect, and that the defendant neither has nor is entitled to acquire, under or by virtue of said agreement, any interest in or to the mining claims and premises described in the complaint herein and in said agreement, and that the title of the plaintiff in and to said mining premises and property be quieted as against any claims of the defendant and that he be enjoined and restrained perpetually from asserting or claiming any interest in said property or right thereto by virtue of said agreement.”

That each of the foregoing pleadings is duly verified.

That on the 12th day of September, 1922, the cause came on regularly to be tried before Honorable Frank S. Dietrich, District Judge of the United States, of and for the District of Idaho.

Thereupon the following proceedings were had, to-wit:

At the commencement of the trial the defendant conceded, and now concedes, that the plaintiff has title to the mining properties involved in the suit, subject to the claim of the defendant to an interest in that property by virtue of the contract between the parties, a copy of which has been heretofore set out and marked Exhibit "A".

Thereupon the plaintiff introduced in evidence said contract, the copy of which is hereinbefore incorporated as Exhibit "A". It is stipulated that said contract was duly recorded, at the request of the plaintiff, in the office of the County Recorder of Owyhee County, Idaho, on July 25th, 1918, and is of record in Book 4 of Bonds and Agreements on Page 259 and following of the records of the said County.

Thereupon the plaintiff introduced in evidence the letters, of which the following are copies, constituting the correspondence between the plaintiff and the defendant relative to the aforesaid contract:

Silver City, Idaho, 7-12-18

Mr. J. W. Long, Baker City, Oreg.

Dear Friend:—I arrived in Silver City a few days ago. I have been busy chasing after horses on foot. I am going out on horse back in the morning. I have found that there are several air compressors idle. I have not had

time to find out if we could get any of them to use. I have been in the tunnel it would not take very much work to clean it out. I am enclosing a post card picture of Silver City. It will perhaps look natural, and put you in mind of old times. I am sending you an average sample of ore from the drift in the Winze. The man I loaned that mining book to is out of town on a summer vacation. That contract has not been sent here yet to be recorded. Write soon.

Very Truly Yours, J. W. Daly,

Baker, Oregon, 8-1-1918.

Mr. J. W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Received your letter of the 12th in due time. I have been busy, been out of town 2 different trips since you were here. Haven't anything of importance to write, only I saw C. R. Barnard on a recent trip down Snake River, you know him, he makes his home in Nampa? He said there was a considerable amount of old electric wire at the old Delamar mill and there was 2 Allis Chalmers Air Compressors about 10x10 and they were junking that so it might pay you to look over the stuff, might be something we would want? B. F. Bennett Mgr. Old De Lamar Mill De Lamar, Ida. I sent your sample to Union Assay office, Salt Lake City, Utah, and you will receive a duplicate assay certificate in due time as I ordered 1 sent direct. I made inquiries about that mining contract so if it hasn't arrived yet and isn't Recorded you might have it held until you can send the number & page and date & etc. of those claims as they are located to C. T. Godwin Lawyer Baker, the fellow who drew up the contract and if he thinks it necessary he can insert it in the contract, and when it is put on record we will not have an extra ex-

pense attached. I spoke to him about it and he said it was mailed all right but it has been missent he said it might of been sent to Owyhee Post office instead of Silver City, Ida. However, it will show up later if it has not yet? I thank you very much for your card, very nice indeed. Say! I know one of those fellows who runs the Trade Dollar Mine and have meet the other fellow so I believe we can get to hook on to the Transformer at the Black Jack. Would like to hear how you found everything, let me know at once. Hoping you are getting along nicely would like to be up there now but am busy here soveling ore. The nights here for the last two have been hot. Will close for time hoping to hear soon, I am,

Very trust yours, C. W. Long.

Jordan Valley, Oregon, 8-11-18.

Mr. C. W. Long, Baker City, Ore.

Dear Friend:—Your letter of the 1st Inst. rec'd and contents fully noted. I have been here since the 25th of July. I am helping my consin J. C. Driscoll, put his hay up. I am also trying to get a lease on the creek which I mentioned to you before I left Baker. There is not any thing for sale at present around the Old DeLamar mine or mill. There is a deal on for that property. I spoke to Mr. Foster and Benson about hooking on to the Black Jack transformer. They told me it was a very small one, only large enough for their own use. I asked Mr. St. Clair about the machinery at the Potosi mine. He told me I would have to ask W. F. Sommercamp. He lives at Weiser, Ida. The Silver City mine shut down, and have taken all the track, and other machinery out of the tunnel. The Company has another mine bonded up above Boise where they are moving most of the

material and machinery. There was a dandy little air compressor that would just suit for our work. I may be able to get a small motor from them. The contract arrived in Silver a couple of days before I left. It was missent to Owyhee, Ore. It cost \$3.00 to record it. I suppose Mr. St. Clair will send the Page number and date to Mr. C. F. Godwin. Mr. St. Clair is a very obliging man he will send you any information that you may desire in regard to those claims. I do not know when I will go back to Silver. The end of this job is not in site yet. I found everything all wright except for a little muck stuffed down in different places in the tunnel. I do not expect that sample to assay very much. I know C. R. Benrod he was here about 10 years ago. I wish you would write to Mr. Sommercamp about that hoist and small air compressor it is just about the right size for that tunnel. I mean it can be taken into the tunnel without much trouble. When you write again let me know if you got that lease on the crome ore. I have explained all for this time will gladly furnish any further information. Write soon with best regards to all enquiring friends.

Yours Very Truly, J. W. Daly.

(Address Jordan Valley, Ore, co. J. C. Driscoll.

Baker, Oregon, 11-21-1918.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—I guess you have been wondering what has happened to me. I have been intending to write but have been waiting thinking I would have something of interest to write you. I got tied up in a property in the Mormon Basin country and could not get away to come up & work with you & the Draft business bothered me too but that part is all over

now, at least it looks that way. I don't know just what the property amounts to but it is a fair showing & is free gold. I waited thinking we would get started milling ore on a 3 stamp mill, so if you did not have anything special & did not want to work your property you might want to come over & work with us. But we haven't been able to get the mill started. However, I believe we will be able to start soon. Have you been working on your claims yet this fall? I did not write that fellow about the compressor outfit. Do you expect to work any this winter? Would like to hear from & know how you are getting along. I am leaving for the mine today, so you can writ me at Rye Valley, Oregon & I will write you when I hear from you. I am Very Truly Yours, C. W. Long.

Jordan Valley, Oregon, 12-13-18

Mr. C. W. Long, Rye Valley, Oregon.

Dear Sir & Friend:—Your letter of Nov. 21st just rec'd. I was very glad to hear from you, and to know that you had a lease on a property with such a fair showing (Success to you.) I did not do any work on my claims since I saw you in June. I was up there on the 1st of Nov. I have been here since July. I will leave shortly for Boise to have one of my fingers operated on for bone bruise. I can not promise you for sure when I will be able to go at heavy work. However as I have nothing particular in sight I may go down and see you sometime this winter. I do not expect to do any work on my property this winter.

Yours very truly, J. W. Daly.

2-10-19

Mr. Charles W. Long, Rye Valley, Oregon.

Dear Sir:—I drop you a line to let you know

of my whereabouts. I have been in Boise since the 30th of Dec. I have been laid up with a bruised tendon on one of my fingers since October. I was operated on the 4th of January. There is still an infection in my finger. The Dr. is figuring on an operation yet before it is possible for it to heal. There is a great deal of puss coming out of it. It may be several months before I will have the use of my left hand. We are having a very mild winter throughout southern Idaho this year. I do hope that you are making good in that lease. I like to hear of men making good money who take chances in mining. I visited my claims the first of November. My plans are not very satisfactory at present. I have been under a great expense since having to quit work. I do wish to be able to get work soon. I am very tired of loafing in Boise. I will close by wishing you the best possible success in your mining venture.

Yours very Truly, J. W. Daly.

Nampa, Idaho, 3-25-19.

Mr. C. W. Long, Rye Valley, Ore.

Dear Sir & Friend:—Your letter of the 18th Inst. rec'd and contents fully noted. I am very glad to hear that you are still taking out ore on the property which you are working. I had to make a special trip from Nampa to Boise to get the letter because it was registered. I left Boise on the 18th inst. It has been two weeks ago today since the Dr. took the bandage off my hand. It was bandaged on a splint for 65 days. I will always have a crippled finger. I can't close my fingers enough to grip anything. I am realy sorry but I cannot go to work for you. If I was able to I would be glad to do so. I have been trying to get a job paint-

ing. I do not know whether I will succeed or not. Nampa is sure on the boom. There are a great many buildings going up here. I could get work here at from \$3.50 to \$4.50 per day if I was able to use my hand. The middle finger next to the index finger is stiff and always will be. I will enclose the lease and bond agreement you sent me. I wish you continued success in all your leases.

Yours very truly, John W. Daly.

Baker, Oregon, 8-14-1919.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Wrote you some time ago to Nampa and your letter was returned to me & I wondered where you had gone & how you are getting along? Do you expect to work on the Mine this Fall? If you do let me know and I will send a man or we can get one over there or I will come over myself, providing I can get away. If you do not intend to work it would be a good idea to do some repairing, would it not? I want to make a trip over there as soon as I can get away to come. How are things looking in the District? How is your hand getting, can you use your hand to work? Do you think we could use a gasoline Hoist in the tunnel & could you haul it up from Murphy or could we hook on to the transformer at 'Black Jack Mine'. Have they installed a larger transformer yet? I have a 6 H P. Fairbanks & Morse Hoist & we could hook on to the Hoist & not ship the engine. The Hoist is complete with 150 ft. 1 inch cable & there is a large bucket that we can get if we want it. That Compressor outfit we were talking about is it still over there and can we get it? & is there a motor there? Let me know just what you want to do? Hoping you are getting along

nicely. I am here in Baker for a while, would be glad to hear from at once I am

Very truly yours, C. W. Long.

Silver City, Idaho, 8-18-19.

Mr. C. W. Long, Baker, Oregon.

Dear Sir & Friend:—Your letter of the 14th Inst. received and was glad to hear from you. I should have written to you when I came here to do some work on the claims. Any body who has unpatented mining claims are exempt from doing the work until next year. I did not know that until after I had started to work. I have been doing the work in an upper tunnel. I have started to clean out the lower tunnel. It is in fairly good shape except one cave close to the winze. I made inquir's about the power line. I was told that we could not hook onto the Black Jack transformer house. I am pretty sure that we could work a gasoline hoist in the tunnel. There is good air, only 25 ft. from the winze is an air shaft I have been offered a job helping a couple of fellows do assessment work for the Rick Gulch Co. 11 claims. So far I have refused the offer, but I think that I will reconsider it, and go to work for them. I can sleep in my own cabin and every evening I can muck a few cars in my tunnel. My fingers have all limbered up except one. I am doing better than I expected. It is very dull here. The Florida Co. is sinking a shaft below the Dewey Tunnel level. I would like to know what day you are coming I would try and meet you. Yours very Truly, J. W. Daly.

Baker, Oregon, 9-19-1919.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Received your letter of the 18th Aug. glad to hear from you and to

learn your hand is getting better. I should have written you sooner but did not know just how my affairs were going to turn out over here. What do you want to do about the claims this winter, do you want to work or not? If you do not it would suit me as far as can see at the present time without I can turn something and come over myself. In case it suits you not to work and let the claims go over except one as I understand will have to have the assessment work done on, as only 5 claims are exempt from doing work on. If you want to do the work, oh have done the work all ready let me know and I will send the amount also there is some for Recorders fees that is coming to you, so if it suits you to let them go over have it all fixed up and let me know & also give me something to show that these arrangements are all right and satisfactory and I will record it, also send bill over for my part of assessment work and I will pay you. I believe if we can arrange to put in some machinery to hoist & drill it will be best when we get started. Please let me know what you want to do by return mail. I have plenty to do over here if you don't want to work your claims expect to make a sale here most any time.

I am, Very truly yours, C. W. Long.

Silver City, Idaho, 9-26-19.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of the 19th rec'd and glad to hear from you. I am still working on the Rich Gulch property. Will be through in a few days as they are only representing six claims this year. This property has a nice little air compressor and motor. It may never turn a wheel the shape things are in. You state in your letter that your affairs are

not in shape for to permit you to start to work on my claims this winter. I look at the proposition this way. If we have to install machinery, and especially electric machinery it would be a heavy expense for both of us. Would you consider the idea of incorporating the property? There is only one reason why I am so anxious to work the property at an early date, is the condition the tunnel is getting in. I have put in two months work on the claims this summer, and expect to put in two more months before the snow flies. I am driving a crosscut to tap a ledge at the intersection of a cross ledge a very likely place for an ore deposits. It is not a matter of assessment work with me. It is the object of developing pay ore. I will have about four hundred dollars when I get this money from Rich Gulch Co. The cross-cut is up near the apex of the mountain quite a ways from the cabin. You do not owe me any money for assessment or recorders fees. Let me hear from you again? I think I have mentioned everything of importance in this letter so I will close.

Yours Very Truly, John W. Daly.

Copy sent to Recorder's Office.

Baker, Oregon, 9-30-1919.

Mr. John W. Daly, Silver City, Idaho.

Care County Recorder Owyhee Co., Ida.

I am ready to fulfill my agreement with you and go ahead with the development work on the Daly Groupe of Quartz mining claims according to our agreement on file, County Recorders Office, providing you wish to commence work October 1st. You can put on a man and I will pay the bill. Will be over later on. Did you get my letter?

C. W. Long.

Silver City, Idaho, 10-13-19.

Mr. C. W. Long, Baker City, Oregon.

Dear Sir & Friend:—Your letter of the 30th of Sept. received last monday the 6th. I presume you think I am a queer fellow not to write. I am making a special trip to town to mail this letter. I was 44 days that I did not go to town. I wish I had been where I could have got an answer to your letter of Sept. 19th sooner. I did not put a man to work as you requested. I will give you an extension of time to carry out the agreement. I can't work this winter on these claims and keep up my end of the expense. Everything is very high. I am of the same opinion as you are in regard to working these claims. We should wait until we can install some kind of machinery. I have got the tunnel in fairly good shape except one cave close to the winze. In regard to the extension of the agreement. I will wait until we can meet if you cannot come up here. I will go to Baker in about six weeks. I would be looking for a winter job now but have got some grub I want to use.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 2-3-1920.

Mr. John W. Daly, Nampa, Ida.

Dear Sir & Friend:—Replying to your letter 10-13-19. I have been out of Baker for some time. Just came back yesterday, have been working at the Highland Mine as timberman. I would like to hear from you by return mail and know whether or not you are working and if not would you want to work any more on the claims. Providing however we could do any thing there that is in the way of hand work and you think it advisable to go out and go to work. Please let me know all of the par-

ticulars, that is just what I would need to bring in the way of tools and bedding and what the probable cost of a grub stake, and where we would buy and etc. I have some time and would like to get busy. Hoping to hear from you by return mail I am with best wishes

Very truly yours, C. W. Long.

Please are they working at the Trade dollar and could a fellow get on there?

Jordan Valley, Oregon, 2-9-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of the 2nd Inst received today. I went to Silver and was forwarded from there. It takes the mail two days to get here from Caldwell on account of the bad roads. I was wondering why you did not write an answer to those last two letters, I wrote you last fall. I thought you had gone from Baker to work somewhere. In regard to the claims, and in trying to start to work at this time of the year it is almost out of the question. There is a pile of snow on that mountain this winter. The tember's that are there are very poor a great many are culls. Things have not come my way since I entered into the agreement with you. I was handicaped last year on account of my hand. It cost me several hundred dollars. I have not much grip in that hand one finger is stiff. It is my left hand. I may have to get that finger amputated yet; It is always in the way when I am working. Now to be candid with you I don't believe that I will ever be able to carry out the terms of that agreement. By making this statement you may think that I have another deal on or something in view, but I have not. I have come to the conclusion that this proposition is too expensive for working men like us with

only our own limited capital behind us. Now if you will send me an itemized statement of how much money you have expended since we entered the agreement I will send it to you as soon as I hear from you. Don't let your imagination over ride your judgment like it did mine. If I should ever incorporate, and you should desire to become one of the initial members of the company you may have that privilege. I am pretty sure they are not putting on any men at the Trade dollar. They are working only a few men when the mill shut down in December. They were milling stull dirt. I hope this letter will appeal to you in the right kind of a business way. Hoping to hear from you soon.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 2-18-1920.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Your letter of the 9th inst. received in due time and contents carefully noted. I was very much surprised to learn the position you taken in regard to our agreement concerning the mining claims. I wrote you September 30th that I was ready to fulfill my agreement with you filing a copy of same in the office of Co. Recorder of Owyhee County instructing you to put on a man and proceed with the work & I would pay the bill. You write me saying you could not work this winter and keep up your part of the expenses & that you had some grub there, that you wanted to use up before coming out & that you would be in Baker in about six weeks. You stated in your letter dated 10-13-19 you would give me an extension of time to carry out my agreement, and in regard to the extension of the agreement I will wait until we meet if you can-

not come up here, so I waited for your coming but you did not show up in Baker. Now when I entered into this agreement I done so in good faith with object of helping develop same & my fai&th is unshaken and am of the opinion the claims are good & will develop into a paying mine. I am ready and willing to go ahead with my part of agreement. I was under the impression you did not care to as could not work on the claims this winter. I do not want to give my contract up. Now John I realize you have had hard luck and possibly you think best not to install machinery at the present time, which possibly would be the best, but this will not keep us from doing hand work and going right ahead and sink. Providing However you are not able to put up for your part of the expenses. I will help you so we will be able to get along some way and develop the claims. I am figuring on getting some money out of some Interests I have, and should I be able to do this I will buy what machinery we need to do this work, and you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you. I thought possibly we might be able to buy the Compressor outfit you was speaking of in Rich gulch or near your claims. Now don't think hard of me for how I am seeing things as I do. Have planned on doing this work for some time and do not want to be dissappointed. Hoping to hear from you soon, and I will keep you posted as to what I am doing, may want you to mill some ore for me later on. I am

Very truly yours, C. W. Long.

Jorday Valley, Oregon, 3-8-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—Your letter of Feb.

18th received yesterday. I was out of town for nearly three weeks just returned yesterday. I have always endeavored to answer your letters promptly. I was very much disappointed when you failed to answer my letter last fall. I do not think that I stated for certain that I would go to Baker in six weeks. If my recollection is correct I stated that I may go to Baker in six weeks. I remember of promising you an extension of time. You would have to see the mine to under the true condition of things. I do not think that correspondence will ever bring our views in harmony. I know that when we meet we can come to some understanding. I have got some work here that I want to finish then, I expect to go up to Silver. I do not know exactly when that will be. I am sorry to say that I cannot go to Baker to work on your mill run. I suppose it is only a short job.

Yours Very Truly, J. W. Daly.

Baker, Oregon, 7-12-1920.

Mr. John W. Daly, Silver City, Ida.

Dear Sir & Friend:—Received your letter some time ago and intended coming up there over a month ago, but as yet cannot get away. Will be up before long. Am expecting to make a turn on some property here and want to get through with it and I will come up there. I can ship up a Hoist from here either to run by gasoline or electricity. I think it best to install a Jackhamer outfit and if you are not able to carry your part I will try and install the outfit so we can get started and you can pay for your part when you get able to take care of it. I look to make a deal any time within the next 30 days & I will come at once. I have confidence in your property and intend to live up to my part of the agreement, and

I will help you to live up to your part. I will let you know later when I can be there. Hoping you are getting along nicely, I am with best wishes,

Very truly yours, C. W. Long.

Silver City, Idaho, 8-21-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—I just rec'd your letter of the 12th inst. I was kind expecting to hear from you. I have been here since the 7th June. I made a trip to Boise on the 3rd to get some grub. My mare died last winter so I have to carry my supplies on my back. I was looking at some used cars when I was in Boise. They ask too much for the old worn out cars. What a fellow ought to have is a sort of caterpillar or low geared truck that would climb at 50 per cent grade. I hope you make your deal soon. I think it would be a good idea not to ship a hoist until arrangements had been made for power. Then you would know exactly what kind of hoist to ship. They have changed management of the Florida Mt. Co. since I spoke for power. They might permit us to hook onto the Black Jack transformer. The tunnel is in as good shape as it was last year. I think two men would put it in good shape in three weeks or a month. If you are willing to put up my share of installing the machinery. I will require a written agreement when I shall pay my share. Now Charlie when you come too Silver don't talk about your business to any body. Either on the way or after you get to Silver. You do not have to make any enquiries of my whereabouts. You will arrive about 3 p. m. that will give you ample time to come up to the claims that evening. It will not be necessary for you to telephone. You may write but I

may not get the letter until after you arrive. I aim to go to town every saturday night. I am going to town today. I have been appointed one of the appraisers of the Gold Rock mining claims. They are settling the Dr. Sanders estate. Excuse this pencil writing. Wishing you the best of success with your deal.

I am Yours very Truly, J. W. Daly.

P. S. Pretend that you are seeking a lease on some other old mine that has been a producer.

Baker, Oregon, 9-27-1920.

Mr. John W. Daly, Silver City, Idaho.

Dear Sir & Friend:—Replying to your letter of July 21st will say I have waited on answering you on account of making a deal, but finances is in such a condition & prices being so high that people are holding off and are not taking hold of mining property and Presidential election being near all make it against selling mines. However, I am confident by early spring will be able to make a turn so we can go ahead and install a hoisting and jackhammer outfit on your claims. I have considered the proposition and should I make a turn or be able to get out a shipment of high grade ore which is possible and probable, I will install a power plant for hoisting & drilling and I will make you a present of a half interest in same. I don't believe we can accomplish very much until we can do this, do you? However, if you want to work there this winter go ahead and put on a man and hire him as reasonable as you can and start in October 1st and send in the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record. Now in case you don't want to work there this winter let me know at

once just what you want to do about it and when the assessment work is finished you can come over to Baker and we can have a settlement. How much am I going to owe providing you are not going to stay there all winter? Now in case you want to come over I have a proposition figured out for us to work on providing we can get it? Providing we could would have a good chance to make some money this winter but would not want to start in until the latter part of December. There is a contract of driving a drift you could get, and could do this by day or contract, should you take it by day could get your grub furnished, could get this done before we would start in on the other proposition and your pay would be good and in the same part of the country where other proposition is located. Let me hear from you soon just what you are going to do. And case you don't want to work there you can give me an extension of time and I will file same. I would like to know just what you can buy that Air Compressor in Rich Gulch or near there for? and what size & etc. & also make? Maybe we could borrow it? Could you rustle a electric motor and could we borrow or if we had to buy what would same cost? Could we hook on to the Blackjack transformer, and do you know where we could get wire & etc. are they a Hoist there we could get & etc. Hoping to hear from you soon and let me have all the news of interest. Write me at Sparta, Oregon. I am with best wishes for you and yours,

I am, Very truly yours, C. W. Long.

Silver City, Idaho, 10-2-20.

Mr. C. W. Long, Baker City, Ore.

Dear Sir & Friend:—I received your registered letter of the 27th Ult. and contents fully

noted. I am real sorry that you were unable to make a deal. I think that in the near future that high prices will adjust themselves. Then there will be a greater demand for mining proprty. The demand for coinage since the war has increased. I have found out that we cannot connect on-to the Black-jack transformer. The Dewey tunnel is shut down since the middle of August. They are in debt about twenty Thousand dollars. They are being sued by the power company for (\$2000.00). The De Lamar is also shut down. They are being sued for six thousand dollars. It is not a very good business policy to get in debt. I do not want to stay here this winter because I am not prepared to do the work I want to do. As to hiring a man I cannot work him to advantage. I am through with the assessment work for this year. But am still working in the lower tunnel so that it won't cave any more. I am enclosing a letter from my Mother of recent date. You can see by it that I need not be idle. I have been getting them kind of letters since the 1st of September. I consider that you do not owe me anything for assessment work. If we ever got started to do anything I would have that much coming to my credit. I do not want to grant you an extension of time on the present agreement. It will be time enough when you are ready to commence work. I will give my reason. Somebody might want an option a lease or a bond I could not give either if the property is tied up. The Rich Gulch Co. is going to start up next year so we could not get that air compressor. They company have taken all the idle machinery, and now they are not working. I could not think of going so far away to work when I can get all the work I can do in Malhure Co. Oregon. I expect to be here

until after election. Common labor is \$6.00 per day here and skilled is 7 & \$8.00 per day. Wishing you the best of success in all your deals.

I am Yours Very Truly, J. W. Daly.

Baker, Oregon, June 28, 1921.

John W. Daly, Esq., Silver City, Idaho.

Dear Sir:—Again I write you relative to our contract covering the Daly Group of Mining Claims near Silver City, Idaho. While at Silver City recently I discovered that you contracted your interests in this property to the Banner Mining & Milling Company. I do not know these people and will ask that you tell me how you have protected my interests in these properties. I have never at any time given up my interests, as you well know, so for this reason I want information with reference to the assessment work and as to when it will be possible to continue work in developing and improving the property. Trusting that I will hear from you in the immediate future, I remain,

Very Truly Yours, C. W. Long.

The plaintiff J. W. Daly was sworn as a witness on his own behalf, and identified the agreement, of which Exhibit "A" attached to the counterclaim of the defendant and heretofore incorporated is a copy, as the contract made between himself and the defendant C. W. Long relative to the mining property described in the complaint. He testified that the mining property therein described is located near Silver City in Owyhee County, Idaho, and that it has an elevation of about 7500 feet; that it is a prospect having no developed ore; that there is

some equipment on it, such as a track and car, but no power or power machinery installed.

He testified that following the making of the contract and until the time of the trial Long had done no work on the property and had not been on the property to the knowledge of the witness; that during the period of three or four years following the execution of the contract Long was in the vicinity of Baker City, Oregon; that the witness corresponded with Long during this period, and he identified the letters heretofore incorporated as the letters written by him to Long and received by him from Long; that in addition to this correspondence the witness had a telephone conversation with Long, but that beyond this correspondence and telephone conversation there had been no oral or written communications between them and no further contract or agreement; that the telephone conversation was in the fore part of February, 1920; that the witness was at that time in Jordan Valley, Oregon, and Long was in Baker City; that Long called the witness, and the substance of the telephone conversation was Long wanted to know if it would be feasible for himself and witness to go up and start working on the property in question at that time of the year, and witness told him no, he didn't think it would, that the mountain was covered with snow, and they couldn't get up there with a team with their supplies; that witness also had some written

correspondence with Long on the same subject about that time; that the statements of the witness to Long made at that time with reference to the snow on Florida Mountain were correct.

Witness further testified that when he received the letter from Mr. Long dated August 14, 1919, he quit the tunnel he was working in and went to work in the lower tunnel; that the lower tunnel is the tunnel specified in the contract with Long as the place where the work under the contract was to be done; that he went to cleaning this tunnel out and retimbered it as much as he could, to have it in good shape when Long got there; that witness was ready and able to go to work with Long should the latter have come on October 1, 1919, and that he would have gone to work on October 1st should Long have arrived.

Witness testified that when he received the letter from Lond dated July 12, 1920, he started in again to clean out the same tunnel; that the tunnel was considerably caved; that he was able to go to work with Mr. Long on the claims in question on October 1st, 1920 and was there on the ground at that time waiting for Long to come, and was ready to go to work at that time should Long have come.

Witness testified that Mr. Long had never sent any supplies, machinery or equipment to the property, and never purchased any to the knowledge of

witness; that Long never paid witness any money on account of assessment work, and never paid anything on account of labor done there, and had never done a day's work on the property or been on the property to the knowledge of witness; that witness had never prevented Long from going to work there.

On cross-examination Daly testified that in October, 1920, he was on the property waiting for Long to come and go to work; that he did not advise Mr. Long that he was there ready to go to work and express a desire that Long should come and work on the property at that time; that he remained on the property waiting for Mr. Long until the 12th or 15th of November, 1920; that he wasn't expecting Long after the first of October, but was expecting him on or about the first of October; that what led witness to believe that Long would be there on or about October first was that the agreement between witness and Long had stated that Long was to commence work on or about October first, 1920; that there was an extension; that witness gave Long an extension from 1919 to 1920; that he gave him a year's extension; that the extension was given in October, 1919, by letter, in one of the letters introduced in evidence; that witness had heard from Mr. Long previous to October first, 1920, stating that they had better not start to work that fall; that witness had no other correspondence with Long except those in evidence.

Witness was asked the following question: "In July, 1920, Mr. Daly, you wrote Mr. Long, in which you said: 'Now, Charlie, when you come to Silver don't talk about your business to anybody, either on the way or after you get to Silver. You do not have to make any inquiries of my whereabouts. You will arrive about 3 P. M. That will give you ample time to come up to the claims that evening. It will not be necessary for you to telephone. You may write but I may not get the letter until after you arrive.' Then you add a postscript: 'Pretend that you are seeking a lease on some other old mine that has been a producer.' What was the occasion for that?"

In reply the witness testified that Long had written that he would be up there, that he was coming, that he expected to be up there; that he had written that he might be up there; that he had not fixed any time or said definitely that he would be there; that the reason witness didn't want Long to say anything to anybody that he was coming to Daly's property was because the people would discourage Long, and witness wanted to protect Long against discouraging reports about the property.

Witness was asked to explain statements appearing in one or two of his letters saying that he hadn't received a reply to some letters written the previous fall. Witness answered that it was in 1919, the last two letters. He had answered them right close to-

gether and didn't receive any reply until February, 1920, and that wasn't a reply to those letters. He thought the reply was dated February third. Witness testified he wrote a letter October 13, 1919, and didn't get a reply until February 3, 1920; that he thought he wrote one other letter in October, 1919. Attention of witness was called to a letter written by him March 25, 1919, acknowledging receipt of a letter from Long dated March 18th, 1919. Witness testified he did not have the letter of March 18th, but with the exception of that letter he had produced all the letters received from Long.

Here the plaintiff rested his case.

The defendant C. W. Long, being sworn as a witness on his own behalf, testified that in the early part of February, 1920, he called the plaintiff, Daly, on the telephone. Witness put in the call from Baker City for Daly at Silver City and the latter answered the call at Jordan Valley, Oregon. Witness had written Daly concerning the contract on the mining claims and had not gotten a reply as soon as he thought he should, so he put in a telephone call. Witness could not recall all the particulars of the conversation but testified that he asked Daly about getting started to work on the claims. Daly told him it was out of the question, that there was a pile of snow on the mountain. Witness believes that in the conversation he mentioned about buying supplies in Baker, that is some groceries,

army supplies, for use in connection with the development of this property. Daly did not say anything with reference to the purchase of these supplies but insisted they couldn't start to work at that time of the year. Daly wrote witness a letter immediately after this conversation, about February 8th, 1920, and in this letter was something along the line of the telephone conversation. Nothing was said in the conversation about the time fixed in the contract having expired. The reason Daly gave for not going to work was the climatic condition. Daly said he didn't think they could get to work at that time of the year, that there was a pile of snow on the mountain.

Witness testified that at that time in 1920 he bought some canned army bacon, some prunes and canned jams for use in doing work on the claims, the bill for the same being Forty-four Dollars and something; that he still has most of this stuff; that some of it is at Murphy, Idaho; that he took it to Murphy to work on these claims; that the reason he didn't use it was because witness made a trip into Silver City and made inquiries about Mr. Daly, and the latter was out of town, and witness went to the recorder's office and discovered that Daly had made a contract on his mining property; that this was some time during May, 1921; that Daly had made this contract with the Banner Mining Company; that witness asked to see some records,

told the county recorder he was looking up the Daly property, and the recorder made the remark that the property had been bonded; so witness asked to see and the recorder produced the contract, a copy of the contract that was there in the recorder's office; that later on witness secured a certified copy of this contract, and to the best of his recollection the contract bore the date of the 6th of January, 1921.

Witness testified he did not see Daly that trip, that Daly was out of town; that witness understood he was at Jordan Valley; that witness made inquiries for Daly for the purpose of finding him.

Witness testified that he bought a gasoline engine and hoise for use on the Daly mining property in connection with carrying out the contract between himself and Daly; that this was in 1919, witness thinks during the fall of that year; that he has a receipt that will explain the date it was bought; that the occasion for buying this gasoline engine and hoist was that they needed a hoist in the tunnel to do the work called for in the contract; that Daly had written witness they could use a gasoline hoist in the work there; that witness believes Daly made mention of it in some of his letters; that it was upon that suggestion or statement of Daly's that witness bought this engine and hoist; that ever since this contract was entered into witness

has been able to fulfill his part of the contract, able to go ahead and carry out the work.

On cross-examination the witness stated that some years ago he worked at the Trade Dollar Mine in Silver City; that on that occasion he went in in the early spring and was there during the summer; that witness was aware at the time he made the contract that Silver City was a mountainous country and a high altitude, and knew the winters were severe there and the snow deep, particularly in February; that he bought groceries and supplies in February, 1920, to bring in at that time; that he didn't take these supplies in until the spring of 1921; that he bought some army goods, canned bacon, prunes and canned jams, the principal part of it; that he bought them in February, 1920, to take into Silver City to start work on the Daly property; that that was witness' intentions; that witness still has most of the stuff; that witness is generally busy doing something most of the time; that he buys supplies at times; that this was the first opportunity he had of buying army supplies; that he started with the supplies to Silver City in the spring of 1921, the witness thinks it was during May; that from Silver City witness went to Boise; then he was in Nampa and in Boise again, and then went back to Baker; that after he went back to Baker he wrote the letter of June 28, 1921, to Daly.

Witness testified that on that trip into Silver City he just stayed one night and then come out; that he hadn't written to Mr. Daly since the previous September; that he didn't write Daly on the occasion of his going in to Silver City.

Witness was asked the following questions and made answer as follows:

“Question: You had heard some weeks before that some ore had been found in the Daly property, had you not?”

“Answer: Well I had heard they was working at Silver.

“Q. You had heard about ore being struck in the Daly property or very close to it, han't you?”

“A. Well, I had heard some talk of it.

“Q. Isn't that fact, that you had heard about some good ore being struck in the Daly group, or very close to it, what induced you to go to Silver City in May or June, 1921?”

“A. Well, I went because I wanted to fulfill my contract.

“The Court: No. Answer the question. Read him the question (Question read).

“Answer: No, sir, it isn't.”

Witness testified that this trip was the first one he had made to Silver City since the contract with

Daly was made in June, 1918; that witness bought this gasoline engine and hoist in Baker, Oregon; that he bought it to use in mining; that he bought it to use in Silver City if he wanted to use it there; that when he bought it he was working on the highway; that he did not ship it to Silver City; that the hoist and engine have not been moved from the place it was when witness bought them; that it stands just like it was when he made the deal; that he could not recall whether he bought it before or after he wrote the letter of September 19, 1919.

Witness testified that in many subsequent letters he spoke of installing a jackhammer outfit; that a jackhammer outfit consists of motive power, an air compressor and connecting pipes and a jackhammer and connecting hose; that it does not necessarily entail use of transformers; that a gas driven air compressor can be used; that in numerous subsequent letters witness spoke of hooking on to the Black Jack transformers; that witness had no other place to use the hoist and engine at the time he bought them; that he was working on the highway for wages at the time; that he worked for wages during the ensuing winter for the Highland mine.

Witness testified that he had not been in Silver City since May or June, 1921. Asked whether he had ever been prevented by Daly from working on the claims, he testified that in the letters introduced

in evidence and in his telephone conversation of February, 1920, he had tried to get the work started; that he had no way of telling there was lots of snow on Florida Mountain in February, 1920.

On redirect examination he testified that he had written one letter to Daly which was not delivered; that this letter was addressed to Daly at a place where Daly said he would get his mail; that this letter was returned to witness; that this is the letter referred to in one of the letters introduced as having been mailed to Nampa and returned; that is the only letter which witness can recall that was not delivered.

Here the defendant rested.

From the foregoing facts the District Court of the United States for the District of Idaho, Southern Division, on the 29th of September, 1922, made the following decision:

“DIETRICH, DISTRICT JUDGE:

“It must be admitted that the contract pleaded by the defendant in this case is inartistically drawn, and, in almost any view that can be taken of it, improvident for the plaintiff. It is further seriously doubted whether, in a suit by the defendant for its specific performance, a court of equity would grant him relief. But, unless we find that the defendant has forfeited such rights as he may have, the plaintiff is in effect asking a court of

equity to nullify the contract, notwithstanding the fact that he was competent to make it and did in fact voluntarily enter into it. While a court might for various reasons be unwilling, at the instance of one party, specifically to enforce an agreement, it does not follow that at the instance of the other party it should declare the agreement void.

It is therefore thought that we can in this suit consider but a single question, and that is, whether or not the defendant has forfeited such rights as the contract purports to confer upon him. It is a familiar principle that forfeitures are not favored in law, and upon the whole I am unable to find from the evidence in this case that the defendant is chargeable with such default as would constitute a forfeiture. It must be borne in mind that the work contemplated by the agreement was to be done at the expense of both parties; both of them were to share equally in the burden of it. And hence anything the defendant might do in carrying it forward would impose a burden upon the plaintiff as well. To say the least, the conduct and attitude of the plaintiff in respect to proceeding with the project were equivocal. There is no clear expression of a desire upon his part that the defendant go ahead, and thus incur expenses which both parties must, under the terms of the agreement, share. The plaintiff doubtless came to feel that the contract was improvident on his part. At times

he made it clear that he did not feel financially able to contribute, and hence was unwilling that anything be done. It may very well be that the defendant was in doubt as to his wishes, and it may further very well be that he unequivocally expressed a desire that the contract plan be carried out, the defendant would have met the demand. Upon the whole, I do not feel warranted in finding that the defendant forfeited his rights. Accordingly a decree of dismissal will be entered. Each party will pay his own costs."

Thereafter on September 30th, 1922, said Court made and entered the Decree from which this appeal is taken.

The solicitors for the respective parties hereto submit the foregoing as the agreed statement of the case upon which this cause shall be presented to the Circuit Court of Appeals for the Ninth Circuit for the approval of the Honorable Frank S. Dietrich, District Judge of the United States for the District of Idaho. But the solicitors for appellees reserve the right, in the event it shall become necessary for a proper determination of the questions raised on appeal by appellant, to make a part of this record such other and additional part of the record in the District Court and evidence on the trial, not included in this agreed statement, as may be material to a determination of the question so raised on appeal, and the expense of certifying and

printing such additional part of the record shall be borne in the first instance by appellant.

WILLIAM HEALY,

Solicitor for Plaintiff and Appellant.

Residence, Boise, Idaho.

RICHARDS & HAGA,

Solicitod for Defendant and Appellee.

Residence, Boise, Idaho.

The foregoing agreed statement of the case is hereby approved in accordance with the provisions of Equity Rule 77.

Dated this 2nd day of February, 1923.

FRANK S. DIETRICH,

District Judge.

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows, viz:

That the defendant, C. W. Long, has not forfeited any rights or interest acquired by him in and to the mining claims, premises and property described in the bill of complaint herein, under the

agreement between plaintiff and defendant dated June 24, 1918, and recorded in the office of the County Recorder of Owyhee County, Idaho, in Book 4 of Bonds and Agreements on page 259.

That plaintiff's bill of complaint for a decree quieting his title to said premises and property be and the same hereby is dismissed, each party to pay his own costs.

Dated this 30th day of September, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Sept. 30, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above named defendant, J. W. Daly, conceiving himself aggrieved by the decree made and entered on September 30th, 1922, in the above cause, does hereby appeal from said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal be allowed and the transcript of the record, proceedings and papers upon which said decree was made, duly authenticated,

may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WM. HEALY,
Solicitor for Plaintiff.
Residence, Boise, Idaho.

Service of the foregoing petition and appeal and receipt of a copy thereof admitted this 2nd day of February, 1923, together with notice of the allowances of said appeal.

RICHARDS & HAGA,
Solicitor for Defendant.
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the plaintiff and appellant, J. W. Daly, by William Healy, Esq., his solicitor, and says that the decree entered in the above cause on September 30th, 1922, is erroneous and unjust to this appellant, and that in the records and proceedings in the above cause there is manifest error in this, to-wit:

I.

The Court erred in holding as a matter of law that the plaintiff was not entitled to a decree quieting his title to the premises described in the com-

plaint, and in dismissing the plaintiff's bill of complaint.

II.

The Court erred in holding as a matter of law that the plaintiff waived performance on the part of the defendant of the terms of the contract between the parties concerning the development of the property in controversy.

III.

The Court erred in adjudging and decreeing that the defendant has not forfeited any rights or interest in and to the mining premises described in the bill of complaint under the agreement between the parties.

IV.

The Court erred in holding as a matter of law that the defendant acquired any right or interest in the property by virtue of the agreement between the parties.

V.

The Court erred in holding as a matter of law that the agreement between the parties is a subsisting contract, and that it had not expired in accordance with its own terms.

VI.

The Court erred in holding as a matter of law that the agreement between the parties as a com-

plete and valid agreement capable of being enforced by either part.

VII.

The Court erred in holding as a matter of law that the existing agreement between the parties affords any defense to the appellant's action to quiet his title.

WM. HEALY,
*Solicitor for Plaintiff and
Appellant.*
Residence, Boise, Idaho.

Service of the foregoing assignment of errors and receipt of a copy thereof hereby acknowledged this 2nd day of February, 1923.

RICHARDS & HAGA,
*Solicitors for Defendant
and Respondent.*
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

This day came J. W. Daly, plaintiff above named, and presented his petition for an appeal and an assignment of errors accompanying the same, which petition, being considered by the Court, is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit on the filing of a bond in the sum of One Hundred Dollars with good and sufficient security, to be approved by the Court.

Dated this 2nd day of February, 1923.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That E. G. Elliott and J. R. Smead, being bona fide residents and free holders of Ada County, Idaho, acknowledge themselves to be indebted to C. W. Long, appellee in the above cause, in the sum of One Hundred Dollars, conditioned that whereas, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that Court wherein J. W. Daly was complainant and C. W. Long was the defendant, on September 30th, 1922, a decree was rendered and entered against the said J. W. Daly, and said J. W. Daly has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation having been directed to the said C. W. Long

citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, on the 3rd day of March, 1923;

Now, therefore, if the said J. W. Daly shall prosecute his said appeal to effect and answer all costs, if he shall make good his plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

J. R. SMEAD,
E. G. ELLIOTT,

STATE OF IDAHO,)
) ss.
COUNTY OF ADA,)

J. R. Smead and E. G. Elliott being first duly sworn, upon oath for himself, and not one for the other, deposes and says: That he is a bona fide resident and free holder of Ada County, Idaho, and that he is worth the sum specified in the foregoing bond as the penalty thereof over and above all his just debts and liabilities in property exclusive of property exempt for execution.

J. R. SMEAD,
E. G. ELLIOTT.

Subscribed and sworn to before me this 2nd day of February, 1923.

(SEAL) CLINTON H. HARTSON,
Notary Public for Idaho.
Residence, Boise, Idaho.

My commission expires Feb. 6, 1927.

Endorsed, Filed Feb. 2, 1923.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

STIPULATION RELATIVE TO RECORD
ON APPEAL.

It is hereby stipulated by and between J. W. Daly, complainant and appellant, and C. W. Long, defendant and respondent, through their respective solicitors, that in order to save expenses in the printing and certification of the record and to avoid encumbering the record with papers and proceedings not pertinent to the consideration of the appeal, the following portions of the record and no more shall be transcribed, certified and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, by the clerk of the United States District Court for the District of Idaho, under the appeal taken by the said appellant herein, and shall be included in the printed record of the said appeal, to-wit:

1. Agreed statement of the case under Equity Rule 77.
2. The decree of the court from which the appeal is taken.
3. All papers filed for perfecting the appeal.
 - a. Petition for Appeal.

- b. Assignment of Errors.
- c. Order Allowing Appeal.
- d. Bond on Appeal.
- e. Citations and all orders made in connection therewith and all admissions or returns of service of any of the said papers.

4. This stipulation.

The solicitors for appellee reserve the right, in the event it shall hereafter become necessary for a proper determination of the questions raised on appeal by appellant, to make a part of the record on appeal such other and additional part of the record in the District Court and evidence on the trial, not included in the agreed statement of the case above mentioned, as may be material to a determination of the question so raised on appeal.

Dated Feb. 2, 1923.

WM. HEALY,
*Solicitor for Plaintiff and
Appellant.*
Residence, Boise, Idaho.

RICHARDS & HAGA,
*Solicitors for Defendant
and Appellee.*
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PRAECIPE TO CLERK FOR TRANSCRIPT
ON APPEAL.

To the Clerk of said Court:

Pursuant to the stipulation of the parties filed herein, you will please incorporate the following portions of the record in the above entitled cause into the transcript on the appeal in said cause to the United States Circuit Court of Appeals, to-wit:

1. Agreed statement of the case under Equity Rule 77.
2. The decree from which the appeal is taken.
3. All papers filed for perfecting the appeal.
 - a. Petition for appeal.
 - b. Assignment of Errors.
 - c. Order Allowing Appeal.
 - d. Bond on Appeal.
 - e. Citation and all orders made in connection therewith and all admissions or returns of service of any of the said papers.
4. Stipulation as to Record on Appeal.
5. This Praecipe.

WM. HEALY,
*Solicitor for Plaintiff and
Appellant.*
Residence, Boise, Idaho.

Service of the foregoing praecipe and receipt of a copy of the same thereof admitted this 2nd day of February, 1923.

RICHARDS & HAGA,
*Solicitors for Defendant
and Respondent.*
Residence, Boise, Idaho.

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CITATION.

United States of America to the defendant and appellee above named, C. W. Long, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Idaho, Southern Division, wherein J. W. Daly was complainant, and C. W. Long was defendant, an appeal has been allowed the said complainant J. W. Daly herein, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said Court at San Francisco, State of California, thirty days after the date of this citation to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Frank S. Dietrich, District Judge of the United States Court for the District of Idaho, this 2nd day of February, 1923.

FRANK S. DIETRICH,
(SEAL) *United States District Judge.*

Attest, W. D. McREYNOLDS, Clerk.

Service of the above and foregoing citation, together with receipt of a copy thereof, is admitted this 2nd day of February, 1923.

RICHARDS & HAGA,
*Solicitors for Defendant
and Appellee.*

Endorsed, Filed Feb. 2, 1923.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 71, inclusive, to be true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$82.80 and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 26th day of February, 1923.

W. D. McREYNOLDS,

(SEAL)

Clerk.

